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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
AT YAKIMA

STATE OF WASHINGTON, Plaintiff, v. ALEX M. AZAR II, in his official capacity as Secretary of the United States Department of Health and Human Services; and UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, Defendants.	NO. 1:19-cv-3040-SAB CONSOLIDATED OPPOSITION TO PLAINTIFFS' MOTIONS FOR PRELIMINARY INJUNCTION NOTED FOR: April 25, 2019 With Oral Argument at 10:00 a.m.

NATIONAL FAMILY PLANNING & REPRODUCTIVE HEALTH ASSOCIATION, FEMINIST WOMEN'S HEALTH CENTER, DEBORAH OYER, M.D., and TERESA GALL, F.N.P.,

Plaintiffs,

v.

ALEX M. AZAR II, in his official capacity as United States Secretary of Health and Human Services, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIANE FOLEY, M.D., in her official capacity as Deputy Assistant Secretary for Population Affairs, and OFFICE OF POPULATION AFFAIRS,

Defendants.

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INTRODUCTION

Boiled down to its essence, this lawsuit seeks to overrule the Supreme Court's decision in *Rust v. Sullivan*, 500 U.S. 173 (1991). Then, as now, section 1008 of the Public Health Service Act (PHSA) provides that "[n]one of the funds appropriated under [the Title X program] shall be used in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6. In 1988, the Department of Health and Human Services (HHS) promulgated regulations extremely similar to the rule Plaintiffs challenge here. Those regulations "require[d] a ban on . . . referral. . . and advocacy [of abortion] within the Title X project" and "mandate[d] that Title X programs be organized so that they are physically and financially separate from [abortion-related] activities." *Rust*, 500 U.S. at 184, 188. The Supreme Court upheld those regulations in *Rust*, concluding that their requirements were a lawful construction of the Title X statute, were not arbitrary and capricious, and did not violate the First or Fifth Amendments. *Id.* at 184, 192-203.

Plaintiffs nevertheless seek to preliminarily enjoin a March 4, 2019 HHS Final Rule, the major components of which are materially indistinguishable from the requirements the Supreme Court upheld in *Rust*. *See* Compliance with Statutory Program Integrity Requirements, 84 Fed. Reg. 7714 (Mar. 4, 2019) (Final Rule or Rule). Plaintiffs make no serious effort to distinguish the Rule from the regulations upheld in *Rust*, and Congress has not amended the statute *Rust* interpreted. Notably, Congress *attempted* to enact legislation that would have

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partially overruled *Rust* by permitting abortion referrals within the Title X program, but its efforts were vetoed. *Rust* thus squarely controls.

Plaintiffs' attempts to avoid this binding precedent are unpersuasive. Plaintiffs principally argue that Congress silently superseded section 1008 as interpreted in *Rust* in two provisions: (1) a one-line rider Congress began adding to appropriations bills in 1996, which provides that "all pregnancy counseling shall be nondirective" (the nondirective provision); and (2) a section of the Affordable Care Act (ACA), codified at 42 U.S.C. § 18114 (section 1554), that says nothing about abortion or abortion-related services. This argument—an implied repeal on steroids—is implausible. Neither the nondirective provision nor section 1554 even mentions abortion, section 1008, or *Rust*, much less creates a previously undiscovered statutory conflict. And Plaintiffs cite no legislative history (or anything else) suggesting that Congress sought to smuggle such a major change on a highly controversial subject into these subsequent provisions.

The problems with Plaintiffs' case do not end there. If anything, the nondirective provision *supports* the Rule, which allows pregnancy counseling, including about abortion, if it is nondirective. In addition, the presumption against implied repeals "applies with even *greater* force when the claimed repeal rests solely on an Appropriations Act," *TVA v. Hill*, 437 U.S. 153, 190 (1978), and there is a "very strong presumption that [appropriations bills] do not" substantively change existing law, *Calloway v. Dist. of Columbia*, 216 F.3d 1, 9 (D.C. Cir. 2000). Plaintiffs come nowhere close to rebutting that "very strong presumption":

the nondirective provision they invoke nowhere mentions abortion, *Rust*, or (unlike the legislation that Congress unsuccessfully tried to enact following *Rust*) referrals.

Plaintiffs have also waived any challenge based on section 1554 because they never allege that they (or anyone else) raised this provision during the notice-and-comment process. That omission is understandable. Section 1554 concerns the *denial* of information and services. As the Supreme Court held in *Rust*, restrictions such as those in the Rule *deny* nothing; they are merely limitations on what the government chooses to fund. And even if section 1554 and section 1008 did somehow conflict, section 1554 only supersedes contrary requirements in the Affordable Care Act—not preexisting requirements elsewhere in the U.S. Code, such as section 1008. *See* 42 U.S.C. § 18114 (applies only "[n]otwithstanding any provision of [the Affordable Care] Act").

Plaintiffs' remaining challenges similarly fail. Far from being an unreasonable interpretation of the PHSA, the Rule follows directly from section 1008 and includes requirements *Rust* expressly affirmed. And the charge that the Rule is arbitrary and capricious withers under scrutiny. HHS thoroughly explained its reasoning and offered a rational justification for the choices it made—choices the Supreme Court has already upheld in substantial part.

Given Plaintiffs' failure to establish a likelihood of success on the merits, they cannot obtain the extraordinary relief they seek. But even setting the merits aside, Plaintiffs fail to meet the equitable criteria for a preliminary injunction.

Plaintiffs' speculative predictions of injury likewise fail to establish that they will suffer any irreparable injury in the absence of preliminary relief. The remaining two factors favor the government, which suffers irreparable injury whenever its laws are set aside by a court and which has a compelling interest in following longstanding federal law prohibiting the use of Title X funds for programs where abortion is a method of family planning.

Finally, at a minimum, any relief should be limited in at least two respects. First, it should be confined to Plaintiffs and not extended nationwide. Indeed, in the lead-up to *Rust*, every court that enjoined the 1988 regulations limited that relief to the parties before it, and Plaintiffs provide no good reason for a broader remedy here. In addition, a nationwide injunction would render the proceedings in three other district courts academic and effectively allow Plaintiffs' views to govern the entire country. Second, any relief should be limited to particular provisions found unlawful. The Rule contains an express severability clause and, as a practical matter, the Rule's major components can operate independently. Thus, whatever else this Court decides, there is no basis for enjoining the entire Rule throughout the country.

LEGAL AND FACTUAL BACKGROUND

Congress enacted Title X of the PHSA in 1970 to provide federal subsidies for certain types of family planning services. *See* Pub. L. No. 91-572, 84 Stat. 1504 (1970). Nothing material in the statutory language of Title X has changed since the 1970s, or, for that matter, since the Supreme Court decided *Rust* in 1991.

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Section 1001(a) authorizes the Secretary of HHS to make grants and enter into contracts with public or private nonprofit entities "to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services (including natural family planning methods, infertility services, and services for adolescents)." 42 U.S.C. § 300(a). Section 1006(a) states that "[g]rants and contracts made under this subchapter shall be made in accordance with such regulations as the Secretary may promulgate." *Id*. § 300a-4(a). And section 1008 requires that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." *Id*. § 300a-6. As a sponsor explained, "the committee members clearly intend that abortion is not to be encouraged or promoted in any way through this legislation." 116 Cong. Rec. 37,375 (1970) (Rep. Dingell).

I. PRIOR REGULATORY INTERPRETATIONS AND *RUST*

HHS's initial regulations for the Title X program required only that a grantee's application state that the Title X "project will not provide abortions as a method of family planning." 36 Fed. Reg. 18,465, 18,466 (Sept. 15 1971); 42 C.F.R. § 59.5(a)(9) (1971). Between the time of those regulations and 1988, however, HHS interpreted Title X both to prohibit projects from engaging in activities that "in any way promot[e] or encourag[e] abortion as a method of family planning," and to "requir[e] that the Title X program be 'separate and distinct' from any abortion activities of a grantee." 53 Fed. Reg. 2922, 2923-25

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(Feb. 2, 1988). In 1981, HHS also issued guidelines that required Title X projects to offer "nondirective" counseling about pregnancy termination, followed by referral for abortions if requested. *Id.* At the time, HHS "took the view that activity which did not have the . . . principal purpose or effect of promoting abortion was permitted." *Id*.

The agency modified its approach in 1988. The Secretary adopted final regulations to address uncertainty and confusion concerning the use of Title X funds and to effectuate more faithfully the underlying policy embodied in section 1008 against the use of Title X funds in any way to encourage or promote abortion. *See* 53 Fed. Reg. at 2923-2925; Proposed Rules, 52 Fed. Reg. 33,210, 33,211-22 (Sept. 1, 1987). Those 1988 regulations bear a striking resemblance to the ones Plaintiffs challenge here. The 1988 regulations:

- Prohibited Title X projects from engaging in abortion counseling and referrals, even upon specific request. *See* 53 Fed. Reg. at 2945 (section 59.8(a)(1)).
- Required referrals "for appropriate prenatal and/or social services by furnishing a list of available providers that promote the welfare of mother and unborn child" to every patient client. *Id*. (section 59.8(a)(2)).
- Prohibited Title X projects from "encourag[ing], promot[ing] or advocat[ing] abortion as a method of family planning." *Id*. (section 59.10).
- Prohibited providers from using a list of prenatal and/or social services to indirectly encourage or promote abortion. *Id.* (section 59.8(a)(3)).

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- Prohibited providers from "including on the list of referral providers health care providers whose principal business is the provision of abortions[.]" *Id.* (section 59.8(a)(3)).

- Required all abortion services to be separate and distinct from a Title X funded project, including by requiring a Title X grantee to structure its Title X project "so that it is physically and financially separate" from other parts of a grantee's organization that might provide abortion services. *Id*. (section 59.9).

These requirements were challenged as unauthorized by Title X, arbitrary and capricious, and impermissible under the First and Fifth Amendments. In *Rust*, the Supreme Court upheld the regulations against these attacks. 500 U.S. at 183-203. The Court accepted as reasonable the Secretary's explanation that the "prior policy failed to implement properly the statute and that it was necessary to provide clear and operational guidance to grantees about how to preserve the distinction between Title X programs and abortion as a method of family planning," as well as that "the new regulations [were] more in keeping with the original intent of the statute, are justified by client experience under the prior policy, and [were] supported by a shift in attitude against the elimination of unborn children by abortion." *Id.* at 187 (quotation marks omitted).

In February 1993, the President suspended the 1988 regulations and directed HHS to propose new regulations. *See* The Title X "Gag Rule," Memorandum, 58 Fed. Reg. 7455 (Jan. 22, 1993). HHS then issued a proposed rule, *see* 58 Fed. Reg. 7464 (Feb. 5, 1993), which it finalized on July 3, 2000, *see* 65 Fed. Reg. 41,270 (July 3, 2000). The 2000 regulations removed the provisions of the 1988 regulations that (1) prohibited Title X projects from counseling or

referring project clients for abortion, (2) required grantees to separate their Title X project physically from any abortion activities, and (3) implemented compliance standards for Title X projects designed to eliminate the promotion or encouragement of abortion as a method of family planning. *See id.* at 41,280. The regulations also affirmatively required grantees to provide counseling concerning and referrals for abortion in certain situations. *Id.* at 41,279.

II. THE FINAL RULE

On June 1, 2018, HHS published a proposed rule soliciting comments on proposed changes to the 2000 regulations. *See* Proposed Rules, 83 Fed. Reg. 25,502 (June 1, 2018) (NPRM). HHS explained that its proposed changes were based on what HHS considers the best interpretation of Title X, and, in particular, section 1008. *Id.* at 25,505. HHS further explained that the intent of the changes was to "refocus the Title X program on its statutory mission—the provision of voluntary, preventive family planning services specifically designed to enable individuals to determine the number and spacing of their children[.]" *Id.*

On March 4, 2019, after considering public comments, HHS published in the Federal Register the Final Rule at issue. *See* 84 Fed. Reg. 7714. The Rule adopted the proposals from the proposed rule with only modest changes. As discussed in detail below, the Rule for all intents and purposes restores the 1988 regulations that the Supreme Court upheld in *Rust*. *See infra* Part I.A. If anything, the Rule is more permissive than the 1988 regulations sustained in *Rust* in that it

allows (but does not require) nondirective counseling discussing abortion. *See* 84 Fed. Reg. at 7789.

HHS explained that the Rule provides much needed clarity regarding the Title X program's role as a family planning program that is statutorily forbidden from paying for abortion and from funding programs/projects where abortion is a method of family planning. *See* 84 Fed. Reg. at 7721. As HHS observed, the Rule is necessary because the 2000 regulations "fostered an environment of ambiguity surrounding appropriate Title X activities"—an assessment confirmed by many of the comments submitted in response to the proposed rule. *Id.* at 7721-7722. HHS explained that the Rule rectifies this ambiguity by making a clear delineation between Title X and non-Title X activities and provides grantees with clear direction on how to ensure that no Title X funds are expended where abortion is a method of family planning. *Id.* at 7722.

The Rule will take effect on May 3, 2019, but funding recipients have until July 2, 2019 to comply with the financial separation requirement, and until March 4, 2020 to comply with the physical separation requirement. 84 Fed. Reg. at 7714.

III. THIS LITIGATION

On March 5, 2019, Washington filed its complaint asserting Administrative Procedure Act (APA) and constitutional claims. *See* Compl., ECF No. 1. The National Family Planning & Reproductive Health Association Plaintiffs (NFPRHA) filed two days, later asserting substantially similar claims. *See NFPRHA v. Azar*, No. 1:19-cv-03045-SAB, Compl., ECF No. 1. The Court

consolidated the two cases on March 18. *See* Order, ECF No. 8. On March 22, Plaintiffs in both cases moved for a preliminary injunction to block implementation of the Rule. *See* ECF No. 9 (Wash. Mem.); ECF No. 18 (NFPRHA Mem.). Although their Complaints include various constitutional claims, Plaintiffs do not advance these constitutional arguments in their motions for preliminary injunctions, and the government therefore does not address them here. Pursuant to the Court's March 18 Order, the government now files this consolidated opposition.

ARGUMENT

A preliminary injunction is "an extraordinary and drastic remedy" that should not be granted "unless the movant, *by a clear showing*, carries the burden of persuasion." *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. NRDC*, 555 U.S. 7, 20 (2008). Plaintiffs fail to meet any of these requirements.

I. PLAINTIFFS ARE UNLIKELY TO SUCCEED ON THE MERITS

Plaintiffs challenge a Rule that is materially indistinguishable from one the Supreme Court has already upheld. Most of Plaintiffs' arguments bear a striking resemblance to those the Supreme Court rejected in *Rust*, and their remaining claims are without merit. Because Plaintiffs have no realistic likelihood of

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prevailing on the merits, their motions should be denied for that reason alone.

A. Plaintiffs' Claims Are Indistinguishable From Those *Rust* Rejected

Plaintiffs' challenge to the Rule fails in significant part for a simple reason: The Supreme Court has already upheld HHS's materially indistinguishable—if anything, stricter—1988 regulations against APA challenges indistinguishable from the ones here. Section 1008 of the PHSA provides that "[n]one of the funds appropriated under [the Title X program] shall be used in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6. In *Rust*, the Supreme Court held that this text authorized regulations that (1) barred counseling concerning the use of abortion and abortion referrals as a method of family planning within the Title X program, (2) broadly prohibited a Title X project from advocating abortion as a method of family planning, and (3) mandated financial and physical separation between Title X projects and prohibited abortion activities. 500 U.S. at 183-91.

The language of Title X and section 1008 has not changed since *Rust*. The regulatory provisions Plaintiffs principally challenge—which prohibit abortion referrals as a method of family planning and mandate the physical separation of Title X projects from abortion activities—are materially indistinguishable from those upheld in *Rust*. Indeed, Washington acknowledges that the Rule "reinstated the pre-*Rust* status quo." Wash. Mem. at 8. Plaintiffs' objections to the Rule are

also for the most part indistinguishable from those the Supreme Court rejected in *Rust*.

The counseling, referral, and advocacy restrictions: The Rule prohibits referrals for abortion as a method of family planning but allows nondirective pregnancy counseling, including counseling concerning abortion, so long as "a Title X project [does] not perform, promote, refer for, or support abortion as a method of family planning, nor take any other affirmative action to assist a patient to secure such an abortion." 84 Fed. Reg. at 7788-89 (to be codified at 42 C.F.R. § 59.14(a)). The 1988 regulations upheld in *Rust*, like the Rule here, prohibited "referral for abortion as a method of family planning" in a Title X project. 53 Fed. Reg. at 2945. "[T]he broad directives provided by Congress in Title X in general and § 1008 in particular," the Supreme Court explained, "plainly allows" this "construction of the statute." *Rust*, 500 U.S. at 184. The Rule's more modest approach—prohibiting referrals but allowing nondirective counseling—is thus even more defensible.

Plaintiffs do not explain what features of the restrictions on abortion counseling, referral, and advocacy here distinguish this case from *Rust* in a way that favors them. Indeed, the aspects of the Rule that Plaintiffs attack here were all features of the 1988 regulations *Rust* upheld:

a. Plaintiffs complain that the Rule generally bars abortion referrals within the Title X program. *E.g.*, Wash. Mem. at 10; NFPRHA Mem. at 13-14. So did the 1988 regulations. *See Rust*, 500 U.S. at 184.

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b. Plaintiffs object that the Rule mandates referrals for prenatal care. Wash. Mem. at 21; NFPRHA Mem. at 13. Again, so did the 1988 regulations. *See Rust*, 500 U.S. at 179 (noting that the regulations "clarif[ied] that pregnant women must be referred to appropriate prenatal care services" (quoting 53 Fed. Reg. at 2925)); *compare* 42 C.F.R. § 59.14(b)(1) (effective May 3, 2019) (providing that "once a client served by a Title X project is medically verified as pregnant, she shall be referred to a health care provider for medically necessary prenatal health care"), *with* 53 Fed. Reg. at 2945 (providing that "once a client served by a Title X project is diagnosed as pregnant, she must be referred for appropriate prenatal and/or social services by furnishing a list of available providers that promote the welfare of mother and unborn child").

c. Plaintiffs protest that, under the Rule, providers may refuse to provide information about abortion even if a Title X patient directly requests abortion-related information, and providers must furnish information about alternatives to abortion even if the provider believes that the patient does not want this information. Wash. Mem. at 21; NFPRHA Mem. at 14. But the 1988 regulations "expressly prohibited [a Title X project] from referring a pregnant woman to an abortion provider, even upon specific request." *Rust*, 500 U.S. at 180. And they were even more stringent on counseling. The 1988 regualtions prohibited *any* "counseling concerning the use of abortion as a method of family planning, *Rust*, 500 U.S. at 179 (quoting 42 C.F.R. § 59.8(a)(1) (1989)), whereas

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the Final Rule allows providers to furnish "nondirective pregnancy counseling, which may discuss abortion," 42 C.F.R. § 59.14(e)(5) (effective May 3, 2019).

d. The Rule permits a provider to furnish a pregnant patient with a "list of licensed, qualified, comprehensive primary health care providers (including providers of prenatal care) . . . some (but not the majority) of which also provide abortion as part of their comprehensive health care services." 84 Fed. Reg. at 7789 (to be codified at 42 C.F.R. § 59.14(c)(2)). NFPRHA objects that the Rule requires including providers who do not provide abortion on the list, even if the patient indicates she would like to seek an abortion. NFPRHA Mem. at 14. But the same was true of the 1988 regulations. *See Rust*, 500 U.S. at 180 (list could not "exclud[e] available providers who do not provide abortions"). NFPRHA also attacks the no-majority specification but, again, the rule upheld in *Rust* prohibited providers from "weighing the list of referrals in favor of health care providers which perform abortions." *Id.*; *see also* 53 Fed. Reg. at 2945. And while NFPRHA notes that the Rule bars including abortion providers who do not also provide comprehensive primary health care, NFPRHA Mem. at 30-31, the 1988 regulations likewise prohibited "including on the list of referral providers health care providers whose principal business is the provision of abortions," *Rust*, 500 U.S. at 180; *see also* 53 Fed. Reg. at 2945.

e. Plaintiffs repeatedly—but incorrectly—assert that the Rule requires them to conceal information from patients in a manner that violates ethical principles. Wash. Mem. at 10; NFPRHA Mem. at 11, 40-41. Plaintiffs omit the

fact that, unlike the regulations sustained in *Rust*, the Rule permits providers to offer "nondirective pregnancy counseling, *which may discuss abortion*, [provided that] the counselor neither refers for, nor encourages, abortion." 42 C.F.R. § 59.14(e)(5) (effective May 3, 2019) (emphasis added). Plaintiffs largely ignore this component of the Rule. Virtually all of Plaintiffs' "concealment" allegations concern the aspect of the Rule that prohibits providers supplying patients with a list from identifying which providers on that list perform abortion. But the 1988 rule did that and more, prohibiting counseling discussing abortion, and also allowing a list of care providers but similarly prohibiting using such a list to "steer[] clients to providers who offer abortion as a method of family planning." 42 C.F.R. § 59.8(a)(3) (1989).

Nor is the provision of such a list at all "misleading." Wash. Mem. at 10; NFPRHA Mem. at 11. If a patient requests a list of abortion providers, the Title X provider may simply inform the patient that "the project does not consider abortion a method of family planning and, therefore, does not refer for abortion." 42 C.F.R. § 59.14(e)(5) (effective May 3, 2019). Honestly informing a patient about limitations imposed by law is not "misleading." And once again, the regulations upheld in *Rust* permitted a virtually identical response. *See* 500 U.S. at 180 (noting that a "permissible response" to a patient's request for an abortion referral "is that 'the project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion'").

More fundamentally, any attempt to distinguish the counseling, referral,

and advocacy restrictions here from those in *Rust* cannot be reconciled with *Rust*'s categorical reasoning. *Rust* broadly held that section 1008 "plainly allows" a "ban on [abortion] counseling, referral, and advocacy" within the Title X program, 500 U.S. at 184, and here, the Rule prohibits only referral and advocacy. Even if Plaintiffs could identify some differences in their favor between the prohibitions here and those considered in *Rust*—and they hardly try to—*Rust* obviously would encompass these restrictions.

The program integrity requirements: The Rule's program integrity requirements likewise are materially indistinguishable from the 1988 regulations. The Rust Court held that these requirements—"mandating separate facilities, personnel, and records"—were "not inconsistent with the plain language of Title X" and "[c]ertainly . . . cannot be judged unreasonable." 500 U.S. at 187-88, 190. The Court thus accepted HHS's view that "meeting the requirement of section 1008 mandates that Title X programs be organized so that they are physically and financially separate from other activities which are prohibited from inclusion in a Title X program," and that "[h]aving a program that is separate from such activities is a necessary predicate to any determination that abortion is not being included as a method of family planning in the Title X program." *Id*. at 188 (quoting 53 Fed. Reg. at 2940). Plaintiffs do not—and cannot—identify any material differences between these requirements and those upheld in *Rust*:

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a. Both mandate that "[a] Title X project must be organized so that it is physically and financially separate . . . from activities which are prohibited under section 1008";

b. Both provide that a "project must have an objective integrity and independence from prohibited activities";

c. Both direct that "[m]ere bookkeeping separation of Title X funds from other monies is not sufficient";

d. Both set forth a list of four basically identical factors that the Secretary will use to determine whether the requisite separation exists: (i) separate accounting records (the Rule adds the requirement that such records be "accurate"); (ii) facilities separation; (iii) separate personnel (the Rule adds records and workstations to this requirement); and (iv) the extent to which identification of the Title X project is present and abortion-related materials are absent. *Compare* 42 C.F.R. § 59.15, *with* 53 Fed. Reg. at 2945.

* * *

For all these reasons, neither group of Plaintiffs appears to contend that the Rule reflects an impermissible interpretation of section 1008, and *Rust* squarely forecloses any such claim.

B. Neither The Nondirective Provision Nor The ACA Silently Overrules *Rust*

Rust's on-point statutory holding—and the remarkable overlap between Plaintiffs' arguments and the ones *Rust* rejected—disposes of the claim that the

materially indistinguishable Rule is unlawful. By necessity, Plaintiffs therefore take a more creative approach, arguing that two subsequent provisions—(1) a single line requiring that any pregnancy counseling provided in a Title X program be "nondirective," in a rider Congress began adding to HHS appropriations acts in 1996, and (2) section 1554 of the ACA, codified at 42 U.S.C. § 18114, which mentions neither abortion nor abortion-related activities—silently supplant *Rust*. *See* Wash. Mem. at 10; (claiming that the Rule violates "the Nondirective Mandate and other post-*Rust* laws"); NFPRHA Mem. at 12 (arguing that "Congress's Nondirective Mandate responded to the Supreme Court[] . . . in *Rust*").

This argument—that Congress silently overruled portions of *Rust* by enacting two separate statutes and leaving the language of section 1008 unchanged—not only misconstrues the appropriations rider and section 1554, but "runs foursquare into [the] presumption against implied repeals." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 664 (2007). Even putting aside this presumption, any argument that the two provisions supersede *Rust* is implausible. Neither the nondirective provision nor section 1554 mentions abortion, section 1008, or *Rust*, and neither provision was accompanied by any legislative history suggesting that Congress intended to overrule *Rust*. Indeed, when Congress *did* attempt to pass legislation that would have permitted abortion referrals within the Title X program, that legislation was vetoed. *See infra* pp. 23-24. As explained further below, Plaintiffs' argument based on these two provisions fails.

1. The Nondirective Provision Does Not Supplant *Rust*

Since 1996, Congress has included a rider in its annual HHS appropriations act that—in addition to stating that funds appropriated to Title X projects "shall not be expended for abortions"—requires that "all pregnancy counseling shall be nondirective." *E.g.*, HHS Appropriations Act 2019, Pub. L. No. 115-245, Div. B, 132 Stat. 2981, 3070-71 (2018). Consistent with this requirement, the Rule permits providers to provide "[n]ondirective pregnancy counseling," which "may discuss abortion." 84 Fed. Reg. at 7789 (to be codified at 42 C.F.R. § 59.14(b)(1)(i), (e)(5)). The nondirective provision requires no more.

Plaintiffs nevertheless contend that the Rule violates the nondirective provision because the Rule (1) requires that providers refer pregnant patients for prenatal care, while (2) prohibiting referral for abortion as a method of family planning. *See* Wash. Mem. at 21; NFPRHA Mem. at 13-14. Put differently, Plaintiffs read the nondirective provision to *require* that Title X providers make abortion referrals upon request and to bar HHS from mandating prenatal referrals. *See id.* But the nondirective provision says nothing about abortion referrals, much less mandates HHS to bankroll only programs that provide them. This is clear for at least three reasons.

a. For one, reading the nondirective provision to require abortion referrals conflicts with the Supreme Court's authoritative interpretation of Title X—*i.e.*, that Title X delegates authority to HHS to prohibit referrals for abortion as a method of family planning and to allow for mandatory referrals of pregnant

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patients for prenatal care. *See Rust*, 500 U.S. at 184-87. Plaintiffs' argument, then, must be that the nondirective provision implicitly repealed section 1008 and *Rust*. *See* NFPRHA Mem. at 12. But repeals by implication "are not favored and will not be presumed unless the intention of the legislature to repeal is clear and manifest." *Nat'l Ass'n of Home Builders*, 551 U.S. at 662 (quotations omitted).

The same is true with respect to judicial interpretations of statutory provisions, such as the one in *Rust*: "A clear, authoritative judicial holding on the meaning of a particular provision should not be cast in doubt and subjected to challenge whenever a related though not utterly inconsistent provision is adopted in the same statute or even in an affiliated statute." *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514, 1520 (2017) (quoting ANTONIN SCALIA & BRIAN A. GARNER, READING LAW 331 (2012)); *see also, e.g.*, *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 240 (2009) (requiring "a clear expression" of congressional intent to "abrogate" Supreme Court's interpretation of a statute). Even when an "earlier ambiguous provision has already been construed by the jurisdiction's high court to have a meaning that does not fit as well with a later statute as another meaning," any "[l]egislative revision of law clearly established by judicial opinion ought to be by express language or by unavoidably implied contradiction." SCALIA & GARNER at 331. Put differently, it makes no difference that section 1008 contains an *implicit* rather than *explicit* delegation of authority to HHS to prohibit referrals for abortion as a method of family planning and to permit mandatory referrals of pregnant patients for prenatal care. Given the

Supreme Court's interpretation of section 1008 in *Rust*, if Congress intended to abrogate that interpretation, common sense suggests that it would have made its intent clear.

Here, Plaintiffs' argument that Congress silently supplanted the Supreme Court's decision in *Rust* and repealed part of Title X in an appropriations rider is particularly weak because the doctrine "disfavoring repeals by implication . . . applies with even *greater* force when the claimed repeal rests solely on an Appropriations Act." *Hill*, 437 U.S. at 190. Because appropriations acts have "the limited and specific purpose of providing funds for authorized programs," *id*., there is a "very strong presumption that they do not" substantively change existing law, *Calloway*, 216 F.3d at 9.

Plaintiffs cannot overcome that "very strong presumption" here because the nondirective mandate expresses no clear indication that Congress was overriding the Supreme Court's interpretation of Title X in *Rust*. The provision neither mentions *Rust* nor alters the Title X statute, and Plaintiffs point to nothing in the legislative record evincing such an intent. Nor is there any conflict between the Rule and the appropriations rider. The latter provision addresses only "counseling," which is different than the actual *referral* of a patient for medical care. It does not use the word "referral" or dictate terms upon which a Title X provider must make (or refrain from making) referrals for medical care outside of the Title X program. Congress and HHS have long recognized that counseling a patient and referring a patient for particular services are different. *See, e.g.*, *supra*

p. 6 (discussing 1981 guidance); *supra* pp. 7-8, (discussing 1993 guidance); *infra* pp. 23-24 (discussing failed 1992 legislation and nondirective mandate).

There is thus no conflict—much less an irreconcilable one—between Title X, as interpreted by HHS and the Supreme Court, and the nondirective provision. Instead, the Rule adopts a position that appropriately harmonizes the two statutes—prohibiting abortion referrals—consistent with the interpretation of Title X upheld in *Rust*—while requiring that any pregnancy counseling (including counseling on abortion), to the extent it is offered, be nondirective. *See* 84 Fed. Reg. at 7730. The Court thus can give effect to the appropriations act, which does not govern referral activities, without encroaching upon section 1008 or the Supreme Court's interpretation in *Rust*. Here, Congress included no definition of the term "nondirective counseling" in its appropriations rider, much less any indication that it intended to adopt a particular HHS interpretation of that language.

Moreover, HHS's regulatory guidance prior to and since the nondirective provision was first enacted draws a distinction between counseling and referrals. The 1993 guidance (in place when Congress first enacted the nondirective mandate) makes clear that the definition of counseling does not, standing alone, include referrals. To the contrary, it requires, in distinct phrases, that Title X projects (1) provide nondirective counseling, and (2) refer patients for abortion upon request. *See* 58 Fed. Reg. 7464, 7464 (Feb. 5, 1993) (requiring providers "provide nondirective counseling . . . *and* to refer her for abortion, if that is the

option she selects") (emphasis added). The 2000 rule also repeatedly uses the terms "counseling" and "referral" separately. 65 Fed. Reg. at 41,272-75, 41,279. Congress, in its appropriations rider, chose only to include the former term, while excluding reference to the latter.

b. Even putting aside the strong presumption against implied repeals and silent legislative abrogations of Supreme Court statutory interpretations (and the even stronger presumption against implied repeals in appropriations bills), Plaintiffs' attempt to equate "counseling" and "referrals" fails. "Counseling" does not, in its common usage, necessarily include within its definition the act of "referral." While the former is defined in purely verbal terms, *i.e.*, the "furnishing of advice or guidance," Black's Law Dictionary (10th ed. 2014), the latter entails the further, active step of "sending or directing to another for information, service, consideration, or decision," *id*. And, again, counseling and referrals are treated separately in the 1988 regulations, *Rust*, the 2000 regulations, and most notably, Congress's *failed* attempt to overturn *Rust* with the Family Planning Amendment Act of 1992, discussed in the next paragraph.

c. If there were any doubt that the non-directive provision did not impliedly repeal section 1008 and *Rust*—and that "counseling" does not mean "referrals" within the context of the Title X program—the immediate aftermath of *Rust* should erase it. In an explicit attempt to overturn that decision, Congress set out to "reverse[] the regulations issued in 1988 and upheld by the Supreme Court in 1991 to restrict the provision of information on abortion to Title-Ten patients."

H.R. Rep. No. 102-204, at 1 (Sept. 13, 1991), accompanying H.R. 3090. Both houses of Congress passed a bill, the "Family Planning Amendments Act of 1992," that would have amended Title X to explicitly condition Title X funding upon a project's agreement to "provide to individuals information regarding pregnancy management options" upon request. *See* S. 323, 102nd Cong. (1991). The bill defined "pregnancy management options" to mean "nondirective counseling *and referrals* regarding (A) prenatal care and delivery; (B) infant care, foster care, and adoption; and (C) *termination of pregnancy*." *Id*. (emphases added).

That bill was vetoed, *see* Message From the President, S. Doc. No. 102-28, 102nd Cong. (1992), and when Congress returned in 1996 to enact the nondirective provision, which *did* become law, it used entirely *different* language. The nondirective provision addresses counseling, but says nothing about referral. It says nothing about *Rust*. And it does not even require counseling, but merely provides that *if* pregnancy counseling occurs, it must be nondirective. "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442–43 (1987) (citation omitted). And this history confirms that the term "counseling" refers only to counseling, not also to referrals, and that the rider in no way intends to or actually supersedes *Rust* (much less by *requiring* abortion referrals in Title X).

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Plaintiffs' remaining arguments as to the nondirective provision are meritless:

- Plaintiffs claim that the Rule violates the nondirective provision by requiring that Title X providers refer their pregnant patients for prenatal care (just as the 1988 regulations did). *See* Wash. Mem. at 21; NFPRHA Mem. at 13. But again, the nondirective provision addresses counseling alone and says nothing about referrals. And because "[t]he Title X program is designed not for prenatal care, but to encourage family planning," *Rust*, 500 U.S. at 193, such referrals are necessary because pregnancy is a diagnosed medical condition that implicates the need for early prenatal care, *see* 84 Fed. Reg. at 7734; *see also id.* at 7759 ("such care is medically necessary to maintain or improve the health of both the mother and the unborn baby"). Indeed, outside this litigation, Washington agrees that "prenatal care is an important way to improve maternal and infant health outcomes" and insists that the state is "promoting early & continuous prenatal care" by having its own "family planning contractors refer women to prenatal care providers."[1]

[1] *See* Washington State Department of Health, "2018 Washington State Health Assessment," at 159-62, available at https://www.doh.wa.gov/Portals/1/Documents/1000/2018SHA_FullReport.pdf.

- Plaintiffs relatedly insist that the Rule defies the nondirective provision by allowing Title X providers to give patients information about maintaining their health during pregnancy. *See* Wash. Mem. at 21-22; NFPRHA Mem. at 14. In other words, Plaintiffs maintain that Congress banned Title X providers from providing pregnant women with knowledge about how to stay healthy during her pregnancy. That is implausible, to put it mildly. Not even the 2000 rules—which Plaintiffs wish to revert to—prohibit giving prenatal care information, even where no abortion counseling occurs. 65 Fed. Reg. at 41,279 (42 C.F.R. § 59.5(a)(5)). Instead, those rules (like the 1988 rules) distinguish between the terms "referral," "information," and "nondirective counseling." *Id.*

- Plaintiffs likewise object that the Rule does not require providers to offer abortion counseling. *See* Wash. Mem. at 21-22; NFPRHA Mem. at 14. But *Rust* upheld regulations that *prohibited any* counseling for abortion, *see* 500 U.S. at 174-75, and, as discussed above, Congress did not silently supplant Supreme Court precedent through the appropriations rider. Again, the nondirective provision requires only that "all pregnancy counseling shall be nondirective," 132 Stat. 3070-71, not that all Title X providers shall always provide pregnancy counseling, much less that all Title X providers shall always provide pregnancy counseling on a particular option (abortion). Indeed, when Congress wants to ensure that nondirective pregnancy counseling (when offered) includes discussion of a specific option, it knows how to do so. *See* 42 U.S.C. § 254c-6(1) (requiring the Secretary to fund the training of, *inter alia*, Title X clinic staff "in providing

adoption information and referrals to pregnant women on an equal basis with all other courses of action included in nondirective counseling to pregnant women"); *see also* 84 Fed. Reg. at 7730 (discussing this legislation). Congress included no such language with respect to abortion in the nondirective provision. And in all events, Plaintiffs lack standing to object that *other* entities might provide prenatal information but not abortion counseling, when Plaintiffs themselves apparently have no intention to do so.

- NFPRHA also contends that the counseling authorized by the Rule is directive because it requires providers to give patients a list of "comprehensive primary health care providers (including providers of prenatal care)," even if the patient only seeks abortion information or an abortion referral. NFPRHA Mem. at 14. But NFPRHA does not explain how providing such a comprehensive list "directs" a patient to take any particular course. Presenting multiple options to a patient is the paradigm of nondirective counseling. As HHS explained, its approach "is designed to assist the patient in making a free and informed decision," presenting each option in a "factual, objective, and unbiased manner." 84 Fed. Reg. at 7747. That a patient might *later* obtain an abortion *outside* the auspices of Title X is no basis for withholding information *within* the Title X project—nor does it support the atextual claim that a neutral presentation of multiple options is "directive."

In short, Congress prohibited HHS from using Title X to fund pregnancy counseling unless it is nondirective, and the Rule faithfully implements that

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prohibition by specifying that projects can provide pregnancy counseling, including about abortion, but only if it is nondirective. Plaintiffs are not likely to succeed on the merits of this claim.

2. Section 1554 of the ACA Does Not Supplant *Rust*

Plaintiffs' claim based on section 1554 of the ACA fares no better. *See* Wash. Mem. at 22-25; NFPRHA Mem. at 16-18, 28-29. That provision states that, "[n]otwithstanding any other provision of [the Affordable Care] Act, the Secretary of Health and Human Services shall not promulgate any regulation that"

> (1) creates any unreasonable barriers to the ability of individuals to obtain appropriate medical care;
>
> (2) impedes timely access to health care services;
>
> (3) interferes with communications regarding a full range of treatment options between the patient and the provider;
>
> (4) restricts the ability of health care providers to provide full disclosure of all relevant information to patients making health care decisions;
>
> (5) violates the principles of informed consent and the ethical standards of health care professionals; or
>
> (6) limits the availability of health care treatment for the full duration of a patient's medical needs.

42 U.S.C. § 18114.

To start, Plaintiffs have waived any challenge based on section 1554. A plaintiff "must first utilize the opportunity for comment [on an agency regulation] before it may raise issues" in federal court, or else arguments are "waived." *Nutraceutical Corp. v. Von Eschenbach*, 459 F.3d 1033, 1041 n.9 (10th Cir. 2006)

(citation omitted) (collecting cases). "Th[is] rule applies with no less force to a statutory interpretation claim not brought to an agency's attention," because "respect for agencies' proper role in the *Chevron* framework requires that the court be particularly careful to ensure that challenges to an agency's interpretation of its governing statute are first raised in the administrative forum." *Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1298 (D.C. Cir. 2004); *see also Univ. Health Servs., Inc. v. Thompson*, 363 F.3d 1013, 1019 (9th Cir. 2004). Here, Plaintiffs challenge the product of notice-and-comment rulemaking, but never allege that they (or anyone else) raised any purported inconsistency between the Rule and section 1554 during the rulemaking process, and the government is aware of no such objection.

Waiver aside, this argument is meritless. It is extraordinary to now claim, for example, that the Rule "violate[s] the explicit limits that Congress placed on HHS's rulemaking authority in Section 1554," NFPRHA Mem. at 16, when *none* of the Plaintiffs (or, as best as the government can tell, anyone else) noticed any supposed conflict between the Rule and section 1554 during the notice-and-comment process. And before turning to specifics, consider the fundamental implausibility of Plaintiffs' argument. It is a basic principle that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). Plaintiffs contend, however, that Congress (1) abrogated a Supreme Court decision on an *extremely*

controversial subject; (2) *after* it had tried and failed to do so expressly; (3) in a provision that does not mention abortion, pregnancy, Title X, section 1008, or *Rust*; (4) without generating any meaningful legislative history; and (5) in a manner that was so subtle in effecting this transformational change that not even Plaintiffs thought to invoke it in their comments opposing the Rule. That is, to put it mildly, an unlikely proposition.

Turning to specifics, Plaintiffs cannot seriously contend that section 1554 silently repealed section 1008 as interpreted in *Rust*. Section 1554 does not refer to abortion or even pregnancy; it does not refer to section 1008; and it does not refer to *Rust*. And as far as the government is aware, section 1554 was not the subject of any meaningful legislative history, and Plaintiffs provide none.

Nor are section 1554 and section 1008 in "irreconcilable conflict." As discussed further below, section 1554—which is not codified in, or an amendment to, the PHSA and which applies only "[n]otwithstanding [the Affordable Care] Act"—does not even apply to section 1008 (which is not part of the ACA). Beyond that, section 1554 can quite comfortably be read as simply not speaking to the issue of *funding* of abortion as a method of family planning within the Title X program. Indeed, since section 1554 does not refer to either funding of abortion or Title X, it neither "covers the whole subject of [section 1008]" nor "is clearly intended as a substitute." *Branch v. Smith*, 538 U.S. 254, 273 (2003) (citation omitted).

Plaintiffs' argument also conflicts with section 1554's text and multiple interpretive principles. Start with the text. All six subjects of section 1554's sub-sections—unreasonable barriers to appropriate medical care, impediments to timely access to health care services, interference with medical communications, restrictions on disclosure of relevant information, violation of ethical standards and principles of informed consent, and limitations on the availability of health care treatment—involve the *denial* of information or services to patients. The Rule, however, denies nothing. It is merely a limit on what the government chooses to fund. As *Rust* explained, when the government places restrictions on the permissible use of Title X funds, it "is not *denying* a benefit to anyone, but is instead simply insisting that public funds be spent for the purposes for which they were authorized." 500 U.S. at 196 (emphasis added). "By requiring that the Title X grantee engage in abortion-related activity separately from activity receiving federal funding, Congress has . . . merely refused to fund such activities out of the public fisc, and the Secretary has simply required a certain degree of separation from the Title X project in order to ensure the integrity of the federally funded program." *Id.* at 198.

In any event, section 1554 expressly applies "[n]otwithstanding any other provision *of this Act*," 42 U.S.C. § 18114 (emphasis added)—that is, the ACA. *See* Pub. L. No. 111-148 (Mar. 23, 2010). Section 1008 of Title X of the PHSA, however, is not part of the ACA. Nor, for that matter, are Sections 1001 and 1006 of Title X of the PHSA, which give the Secretary authority to award grants and

issue Title X regulations. Had Congress intended section 1554 to extend beyond the ACA, it could have simply specified that section 1554 applies "[n]otwithstanding any other provision of law." Indeed, such language is frequently used in American law in general, and in the ACA specifically; 21 times, by the government's count. *See, e.g.*, 42 U.S.C. § 18032(d)(3)(D)(i). By its own terms, section 1554 does not apply to Title X of the PHSA or its implementing regulations.

That reading also comports with common sense. Section 1554's sub-sections are quite open-ended. Nothing in the statute specifies, for example, what constitutes an "unreasonable barrier[]," "appropriate medical care," "all relevant information," or "the ethical standards of health care professionals." 42 U.S.C. § 18114. And as noted above, there is—as best as the government can tell—nothing in the ACA's legislative history that sheds light on this provision. Under these circumstances, it is a substantial question whether section 1554 claims are reviewable under the APA at all. *See Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (APA bars judicial review of agency decision where, among other circumstances, "statutes are drawn in such broad terms that in any given case there is no law to apply") (citation omitted). Even within the ACA, HHS routinely issues regulations placing criteria and limits on what the government will fund, and on what will be covered in ACA programs. Under Plaintiffs' standardless interpretation of section 1554, it is far from clear that the Government could ever impose any limit on any parameter of a health program—

even if the program's own statute requires it—and how a court could possibly evaluate such challenges by accepting the section's majestic generalities. Indeed, the government is unaware of any instance when a court invalidated a regulation under section 1554, and Plaintiffs have identified none. In any event, even if section 1554 claims are reviewable, it is inconceivable to imagine that Congress intended to subject the entire U.S. Code to these general and wholly undefined concepts—and that it did so without leaving any meaningful legislative history.

Other principles point in the same direction. In addition to the presumption against hiding elephants in mouseholes, "it is a commonplace of statutory construction that the specific governs the general," *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992). That is particularly true where Congress has enacted a "comprehensive scheme and has deliberately targeted specific problems with specific solutions." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (citation omitted). "The general/specific canon is perhaps most frequently applied to statutes in which a general permission or prohibition is contradicted by a specific prohibition or permission." *Id.* Under such circumstances, "[t]o eliminate the contradiction, the specific provision is construed as an exception to the general one." *Id.* Thus, even if section 1554 applied to regulations implementing section 1008 (it does not), even if sections 1554 and 1008 were in conflict (they are not), and even if Plaintiffs had preserved this challenge (they have not), section 1008 as interpreted in *Rust* would prevail over section 1554. Section 1554 is at best a general prohibition of certain types

of regulations (very broadly described). Section 1008, however, is a much more specific prohibition. It applies to funding of abortion as a method of family planning within the Title X program. And in *Rust*, the Supreme Court held that section 1008 authorized HHS to adopt regulations materially indistinguishable from the ones challenged here. Section 1554, by contrast, does not speak to abortion or, for that matter, to Title X at all. Plaintiffs are unlikely to succeed on the merits of this claim.

C. *Rust* Forecloses Plaintiffs' Title X Claims

Plaintiffs' contention that the Rule violates the requirements in Title X that receipt of services or information funded by Title X services remain "voluntary" is likewise meritless. Wash. Mem. at 26 (citing 42 U.S.C. §§ 300, 300a-5); NFPRHA Mem. at 15-16 (same). Both of the Title X provisions Plaintiffs cite predate *Rust*, neither mentions abortion, and *Rust* rejected this argument. *Rust* acknowledged the general Title X voluntariness principle, 500 U.S. at 178, yet held that the physical separation requirements, as well as the counseling, referral, and advocacy restrictions, reflected a permissible interpretation of the PHSA.

Rust aside, Title X services are required to be "voluntary" in the sense that accepting family planning services under the program "shall not be a prerequisite to eligibility for or receipt of any other service or assistance from, or to participation in, any other program of the entity or individual that provided such service or information." 42 U.S.C. § 300a-5. The Rule specifically abides by this requirement in 42 C.F.R § 59.5(a)(2), which is unchanged from the 2000

regulations. The Title X voluntariness principle thus has nothing to do with the issues in this case.

Similarly, Washington also argues that the Rule is invalid because it is contrary to Title X's "central purpose"—in Washington's view, "to equalize access to comprehensive, evidence-based, voluntary family planning services." Wash. Mem. at 25. But Title X's central purpose has not changed since the Supreme Court affirmed materially indistinguishable regulations in *Rust* and rejected a materially indistinguishable argument. *See* 500 U.S. at 185 n.3 (rejecting the challengers' argument based on statements in the legislative history "stressing the importance of supplying both family planning information and a full range of family planning information and of developing a comprehensive and coordinated program").

D. The Final Rule Is Not Arbitrary and Capricious

Much of what remains of Plaintiffs' case amounts to garden variety arbitrary-and-capricious claims. These arguments face a high hurdle. Agency action must be upheld in the face of such attacks so long as the agency "examine[s] the relevant data and articulate[s] a satisfactory explanation for its action[,] including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation omitted). Under this deferential standard of review, "a court is not to substitute its judgment for that of the agency . . . and should uphold a decision of less than ideal clarity if the agency's path may be reasonably

discerned." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513-14 (2009) (citations omitted); *see also Alaska Oil & Gas Ass'n v. Jewell*, 815 F.3d 544, 554 (9th Cir. 2016) ("arbitrary and capricious" standard establishes a "high threshold" for setting aside agency action, which is "presumed valid and is upheld if a reasonable basis exists for the decision"). The Final Rule—the major components of which have already been upheld by the Supreme Court—easily satisfies this highly deferential review.

1. Under *Rust*, it is Not Arbitrary and Capricious to Set Conditions on Title X Funds that Require Physical Separation and Restrict Activities that Promote Abortion as a Method of Family Planning

HHS had a simple and compelling basis for promulgating the Final Rule: to ensure compliance with federal law, and in particular section 1008's command that "none of the funds appropriated" for Title X "be used in programs where abortion is a method of family planning." *See* 83 Fed. Reg. at 25,505. HHS reads this statute, as it did in 1988, to establish "a broad prohibition on funding, directly or indirectly, activities that treat abortion as a method of family planning." 84 Fed. Reg. at 7723; *see also* 53 Fed. Reg. at 2922 (explaining that section 1008 "creates a wall of separation between Title X programs and abortion as a method of family planning"). Based on that interpretation, HHS determined that the intervening 2000 regulations are inconsistent with section 1008 to the extent that they "require referral for abortion as a method of family planning, allow the use of funds for building infrastructure that could be used for abortion services, and

do not require clear physical separation between Title X activities and abortion-related services." 84 Fed. Reg. at 7723. HHS thus determined that the Final Rule is necessary to rectify the problems with the 2000 regulations and to properly implement section 1008.

The Supreme Court has already approved of this reasoning. In particular, it determined that: (1) Title X authorizes HHS to prohibit abortion "counseling, referral, and advocacy within the Title X project," *Rust*, 500 U.S. at 184; (2) Title X authorizes HHS to require physical separation of Title X and non-Title X projects, *id*. at 188-90; and (3) HHS's interest in ensuring compliance with its interpretation of section 1008 justified separation and counseling-and-referral requirements materially indistinguishable from those in the Rule, *id*. at 184-91.

The Supreme Court's rejection of the arbitrary and capricious challenges in *Rust* is controlling here. In response to comments contending that HHS had not "provided sufficient reasons or evidence to justify the physical and financial separation requirements," the agency explained that the Supreme Court has already upheld the separation requirements "as a legitimate interpretation of the Congressional mandate in section 1008." 84 Fed. Reg. at 7764. Similarly, HHS noted that the Court in *Rust* already considered and endorsed the same restrictions on abortion referrals adopted in the Final Rule. *See id.* at 7746; *see also Rust*, 500 U.S. at 193. That by itself was sufficient justification. The policy and legal judgment embodied in the Rule is no less permissible or reasonable than it was in 1988.

2. HHS Adequately Justified the Program Integrity, Counseling, and Referral Provisions

Even if *Rust* were not dispositive here, HHS also detailed the problems of the 2000 regulations and adequately explained the need to impose anew the separation, counseling, and referral provisions.

Program Integrity Requirements: HHS observed that allowing Title X projects to operate in shared spaces with non-Title X activities increases the risk that Title X and other funds will be commingled, that Title X funds will be used for prohibited purposes, and that the public will be deprived of the clear statutorily required assurance that taxpayer dollars are not being used to fund projects where abortion is a method of family planning. 84 Fed. Reg. at 7764-65. HHS observed that these concerns are particularly acute because Title X projects use flexible grants that give considerable "latitude and versatility to grantees on how funds are used." 83 Fed. Reg. at 25,508. This flexibility raises the specter of projects using Title X funds to build infrastructure used to support abortion, which HHS chronicled. *See* 84 Fed. Reg. at 7773 (citing report that Title X funds are used to address "staff-related issues," for "operational investments," and towards "infrastructure and general operations"). In particular, HHS noted that various comments expressing support for the 2000 regulations themselves showed that, as a matter of economic reality, those requirements had the effect of indirectly supporting abortion-related activities. *Id.* at 7766 (comments arguing that separation requirements would "increase the cost for doing business" confirms the

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need for the Rule because if "the collocation of a Title X clinic with an abortion clinic permits the abortion clinic to achieve economies of scale, [Title X funds] would be supporting abortion as a method of family planning"). In this context, HHS determined that even using the "strictest accounting and charging of expenses, a shared facility greatly increases the risk of confusion and the likelihood that a violation of the Title X prohibition will occur." *Id*. at 7764; *cf. Marina Mercy Hosp. v. Harris*, 633 F.2d 1301, 1304 (9th Cir. 1980) ("[I]n a program as complex and ripe with potential abuse as Medicare, the Secretary has broad discretion to control excessive costs by adopting general prophylactic rules.").

Moreover, while HHS was not required to submit empirical evidence, it cited a study showing that abortions are increasingly being performed at "sites that focus primarily on contraceptive and family planning services," *i.e.*, precisely the type of sites that receive Title X funds. *See* 84 Fed. Reg. at 7765. HHS also pointed to examples of overbilling in the Medicaid program as demonstrating a need for clarity with respect to permissible and impermissible activities. As HHS explained, when abortions are performed at Title X facilities that are not clearly separated, it confuses the public about whether federal funds are being used for services that Title X prohibits—as evidenced by the fact that many commenters apparently assumed that abortion was a permissible method of family planning within the Title X program, *see* 84 Fed. Reg. at 7729-30—and increases the likelihood that funds will be used for improper purposes. The more abortions that

are performed at the type of nonspecialized clinics that often house Title X services, the higher both risks. *See id*. at 7765 ("The performance of abortions at nonspecialized clinics that also may provide Title X services increases the risk and potential both for confusion and for the co-mingling or misuse of Title X funds."). Indeed, Plaintiffs' assertions that the Rule may force abortion clinics to lose Title X funding only justifies the Secretary's concerns. *Compare* Adams Decl. ¶ 45 (asserting that the Rule could cause a subrecipient, Eskenazi Health System, "to exit the Title X program"), *with id.* ¶ 45 (Eskenazi Health System "provides abortions").

Counseling and Referral Restrictions: HHS explained at length how the 2000 regulations were in tension with a number of federal conscience protection statutes and, with respect to referral for abortion at least, with section 1008 itself. 84 Fed. Reg. at 7746. As to abortion referrals, HHS explained that "[t]he primary focus of Title X remains on preconception family planning methods and services," and that "[i]n implementing section 1008 . . . the Department has a history of establishing prohibitions on abortion referral, even if at other times it has allowed or required such referrals." *Id.* HHS acknowledged that the 2000 regulations "requir[ed] information, counseling and referrals for abortion as a method of family planning in certain cases," but stated that it "has now reconsidered this issue and believes the approach taken in this final rule is a better interpretation of section 1008." *Id.* In reaching this conclusion, HHS reasoned—consistent with *Rust*—that "it is not necessary for women's health that the federal government use

the Title X program to fund abortion referrals, directive abortion counseling, or give to women who seek abortion the names of abortion providers" because such information is available from other sources. 84 Fed. Reg. at 7746. HHS further explained that, consistent with the conscience statutes, it would not *require* grantees to engage in nondirective pregnancy counseling. It noted that the nondirective provision "did not explicitly require pregnancy counseling, nor [did it] prohibit such counseling from discussing abortion if the counseling is nondirective." *Id.* at 7745.

3. Plaintiffs' Contrary Arguments Lack Merit

Because the Supreme Court in *Rust* held that the major components of the Rule flowed directly from HHS's permissible construction of section 1008 (which, as discussed above, has not changed since *Rust*), any challenge to those restrictions is necessarily limited. *See Arent v. Shalala*, 70 F.3d 610, 616 n.6 (D.C. Cir. 1995) (citing *Rust* as an example of a situation in which "what is 'permissible' under *Chevron* is also reasonable under *State Farm*"). Plaintiffs nevertheless offer up a welter of arguments for why the Rule is arbitrary and capricious. None is persuasive.

a. Plaintiffs fault HHS for supposedly failing to offer up new evidence to support the Rule. Wash. Mem. at 15; NFPRHA Mem. at 23. But as discussed above, HHS described in detail why its concerns were more than theoretical. In any event, the APA "imposes no general obligation on agencies to produce

empirical evidence." *Stilwell v. Office of Thrift Supervision*, 569 F.3d 514, 519 (D.C. Cir. 2009) (Kavanaugh, J.).

b. Plaintiffs also contend that HHS failed to account for supposed reliance interests engendered by the prior policy. Wash. Mem. at 33, 36, 37 n.108 (citing *Encino Motorcars*, 136 S. Ct. 2117, and *Fox*, 556 U.S. 502); NFPRHA Mem. at 38-39. As a threshold matter, the fact that many people "rely" on a particular program does not mean that every policy affecting that program "engender[s]" the type of "serious reliance interests" that the Supreme Court had in mind in *Fox*. *See Encino Motorcars*, 136 S. Ct. at 2126. In any event, Plaintiffs have no legally cognizable reliance interests in the continued receipt of Title X grants under the conditions they prefer. In contrast to the agency action at issue in *Encino Motorcars*, which concerned private parties' substantive statutory rights, *id.* at 2126-27, the challenged regulations here concern discretionary funding decisions. Title X grants are generally available for only one year, 42 C.F.R. § 59.8(b), and HHS regulations provide that "[n]either the approval of any application nor the award of any grant commits or obligates the United States in any way to make any additional, supplemental, continuation, or other award with respect to any approved application or portion of an approved application," *id.* § 59.8(c). A discretionary funding program cannot create legally cognizable reliance interests—and certainly not beyond the stated duration (generally one year) of a Title X grant. *Cf. Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2484 (2018) (discounting asserted reliance interests

because the relevant "contract provisions . . . will expire on their own in two years' time").

c. Invoking the Supreme Court's decision in *Fox*, Plaintiffs suggest more broadly that HHS failed to provide "good reason" for the change in policy in the Rule. NFPRHA Mem. at 22-24; *see* Wash. Mem. at 28-29. But *Fox* squarely rejected the notion that a "heightened standard" should apply where an agency changes policy, 556 U.S. at 514, and held that "it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates," *id*. at 515. HHS plainly satisfied that requirement.

Fox went on to explain that a "more detailed justification" is required only when a new policy "rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account." 556 U.S. at 515. Neither circumstance is present here. As explained, the Rule does not upend any legally cognizable reliance interests. It is also based on HHS's renewed interpretation of section 1008 and, with respect to the program integrity requirements, the need for prophylactic measures to address the risk and the perception that taxpayer dollars will be used to fund will be used to fund abortion—not "factual findings that contradict those which underlay [the] prior policy." That policy and legal judgment—a judgment blessed by the Supreme Court—is legitimate even if it differs from the judgment of Plaintiffs and some prior administrations. *See Nat'l*

Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005) ("[T]he agency . . . must consider varying interpretations and the wisdom of its policy on a continuing basis, for example, in response to changed factual circumstances, or a change in administrations." (internal citation omitted)).

d. Plaintiffs claim that the Rule undermines the provider-patient relationship and requires them to violate ethical standards. Wash. Mem. at 29-32; NFPRHA Mem. at 19-20. But HHS considered and responded to this precise issue:

> In general, medical ethics obligations require the medical professional to share full and accurate information with the patient, in response to her specific medical condition and circumstance. Under the terms of this final rule, a physician or APP may provide nondirective pregnancy counseling to pregnant Title X clients on the patient's pregnancy options, including abortion. . . . Within the limits of the Title X statute and this final rule, the physician or APP is required to refer for medical emergencies and for conditions for which non-Title X care is medically necessary for the health and safety of the mother or child.

84 Fed. Reg. at 7724.

This analysis was not only logical but also consistent with multiple Supreme Court decisions and other legal authorities. As HHS observed, (i) *Rust* upheld similar requirements and HHS "does not believe the Court in *Rust* upheld a rule that required the violation of medical ethics, regulations concerning the practice of medicine, or malpractice liability standards"; (ii) "Federal and State conscience laws, in place since the early 1970s, have protected the ability of health care personnel to not assist or refer for abortions in the context of HHS funded or

administered programs (or, under State law, more generally)"; (iii) "in *Roe v. Wade*, 410 U.S. 113 (1973), the Court favorably quoted [a declaration that n]either physician, hospital, nor hospital personnel shall be required to perform any act violative of personally held moral principles" (quotation marks omitted); and (iv) in *National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018), "the Supreme Court upheld conscience objections to making certain statements, despite objections from professional medical organizations that similarly asserted medical ethics standards." 84 Fed. Reg. at 7748.

HHS thus plainly did not ignore the concerns that Plaintiffs raise; it considered them and simply adopted a different view—that the Rule's requirements, properly understood, are consistent with medical ethics. And again, *Rust* upheld a nearly identical version of the counseling and referral restrictions that had the same implications. 500 U.S. at 199. In fact, Justice Blackmun argued in dissent in *Rust* that "the ethical responsibilities of the medical professional demand" that Title X patients be "provide[d] with the full range of information and options regarding their health and reproductive freedom," including "the abortion option." *Id.* at 213-14. His view did not prevail.

e. Plaintiffs contend that the counseling and referral provisions are arbitrary and capricious because they are supposedly inconsistent with guidelines issued by HHS, along with the Centers for Disease Control, in 2014. Wash. Mem. at 32-34; NFPRHA Mem. at 10-11, 19-20. But this is just a rehash of Plaintiffs' challenge to HHS's departure from its prior policy governing abortion counseling

and referrals. As explained above, HHS was entitled to depart from its previous policy and adopt the position, blessed by the Supreme Court in *Rust*, that section 1008 prohibits abortion referral as a method of family planning and does not require the provision of abortion counseling. *See* 84 Fed. Reg. at 7716-7717. Just as HHS could permissibly depart from the 2000 regulations, it could adopt a position different from the one espoused in the 2014 guidance based on the reasoned justification discussed above.

f. Plaintiffs also accuse HHS of failing to consider the importance of "medical ethics and patient-focused care," which Plaintiffs claim will lead to an exodus of providers from the Title X program. Wash. Mem. at 29-32, 39-40; NFPRHA Mem. at 43-44. There are a number of problems with this claim. As previously noted, the Supreme Court has already upheld HHS's interpretation of section 1008, and HHS has adequately explained that it does not share Plaintiffs' views concerning professional and medical ethics. In any event, HHS considered the effect the Rule would have on Title X patients and concluded that the Rule would "contribute to more clients being served, gaps in service being closed, and improved client care." 84 Fed. Reg. at 7723. The agency further explained that it "expects that honoring statutory protections of conscience in Title X may increase the number of providers in the program," *id.* at 7780, and it pointed to data showing that a substantial number of medical professionals would limit the scope of their practice if conscience protections were not put in place, *id.* at 7781

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n.139. After analyzing this issue in detail, HHS concluded that the counseling-and-referral provisions "will result in more Title X applicants." *Id.* at 7781.

More fundamentally, the very nature of the time-limited and discretionary Title X grant process presupposes that there will be turnover and replacement among grantees. There is thus no basis for rejecting the agency's conclusion on this point, or for substituting the preferences of a subset of current grantees for the Secretary's well-reasoned view. Indeed, in highlighting these departure threats, Plaintiffs essentially request that this Court constrain the authority of HHS beyond the limits imposed by Congress, by giving certain grantees veto power over otherwise legally permissible and reasoned policy judgments. That tactic did not work in *Rust*, and it should not work here either. *Cf.* Planned Parenthood Amicus Brief at 14 n.45, *Rust* (No. 89-1391), 1990 WL 10012649 ("Since many providers will not accept Title X funds under the unethical restrictions imposed by the regulations, they will be forced to close or drastically curtail services, depriving poor women of their sole source of family planning services.").

g. Washington also accuses HHS of failing to consider that the Rule "will force out the subrecipients and clinics comprising the vast majority of Washington's Title X network," because of the Rule's allegedly "unworkable and unnecessary physical separation requirements" and counseling and referral restrictions. Wash. Mem. at 34-38. NFPRHA similarly claims that the Rule "will make it effectively impossible for many . . . providers to stay in the Title X program," NFPRHA Mem. at 24, and will lead to "provider departures . . . at the

grantee, subrecipient, and individual clinical level," *id.* at 38. HHS, however, considered both of these points. As to the prospect of providers leaving, HHS acknowledged that "such calculations would be purely speculative, and, thus, very difficult to forecast or quantify," but ultimately concluded that it "does not anticipate that there will be a decrease in the overall number of facilities offering services, since it anticipates other, new entities will apply for funds, or seek to participate as subrecipients, as a result of the final rule." 84 Fed. Reg. at 7781. And with respect to coordination, HHS explained that "[i]t is not uncommon for people to have different health care providers for different health care needs" and elaborated that "[i]f services and abortion services are separate, it is no more difficult for Title X providers to maintain two electronic records, one for Title X services and another for abortion services, than to keep abortion services and other services separate within the same [electronic medical records (EHR)] system." *Id.* at 7767. HHS went on to explain that, because of the "growing interoperability of EHRs and other health IT, it is a simpler matter for one provider to share a patient's EHR with another provider," meaning that "any risk associated with mishandling or missing patient data should be minimized." *Id.* This analysis was not arbitrary and capricious.

h. NFPRHA further claims that HHS failed to consider the financial costs that the Rule would impose on providers. NFPRHA Mem. at 25-28. Yet, the principle "that a court is not to substitute its judgment for that of the agency" is "especially true when the agency is called upon to weigh the costs and benefits

of alternative policies." *Consumer Elecs. Ass'n v. FCC*, 347 F.2d 291, 303 (D.C. Cir. 2003). In promulgating the Rule, HHS reasonably relied on the available data and considered concerns identical to those that NFPHRA raises here. *See* 84 Fed. Reg. at 7781 (pointing to data from the Congressional Research Service, and explaining that commenters "contend that the department underestimated the costs related to the new physical separation requirements, but themselves did not provide sufficient data to estimate these effects across the Title X program"). NFPRHA's flyspecking of HHS's analysis gets it nowhere.

i. NFPRHA objects to the inclusion of the instruction in the Rule that Title X providers "[s]hould offer either comprehensive primary health services onsite or have a robust referral linkage with primary health care providers who are in close physical proximity." NFPRHA Mem. at 29-31 (quoting 42 C.F.R. § 59.5(a)(12)). According to NFPRHA, because Title X providers already establish referral relationships with primary care providers for their patients, the new subsection "merely confuses and creates an obstacle to Title X family planning clinics." NFPRHA Mem. at 30. To the extent that NFPRHA's concern is confusion, applicants can always seek clarity from HHS. *See* 84 Fed. Reg. at 7766 ("The Department welcomes regular interaction with grantees and subrecipients, should they have questions. Project officers are available to help grantees successfully implement the Title X program in compliance with both the statute and the regulation."). It was also substantively reasonable for HHS to encourage access to primary health care services. As HHS explained, by

encouraging Title X projects to offer either comprehensive primary health care services onsite or have a robust referral linkage with primary health care providers who are in close proximity to the Title X site, the Rule supports other health care goals without limiting access to care. *See* 84 Fed. Reg. at 7725.

NFPRHA's concern that the Rule will lead to a lack of care in some areas, *see* NFPRHA Mem. at 29-30, is also unfounded. Section 59.5(a)(1) does not impose an absolute requirement that a project offer either comprehensive primary health services onsite or have linkages to primary health providers in close proximity. *See* 42 C.F.R. § 59.5(a)(12). It instead reflects Congress's expectation that "'Family Planning Services under Title X generally are most effectively provided in a general health setting.'" 84 Fed. Reg. at 7749 (quoting S. Rep. No. 63, 94 Cong., 1st Sess. 65-66 (1975), *reprinted in* 1975 U.S.C.C.A.N. 469, 528). HHS also accounts for the geographic distribution of awards when making grant decisions. *See* Announcement of the Availability of Funds for Title X Family Planning Services Grants, Notice at 49-50 (explaining that HHS considers "[t]he extent to which the project provides geographic distribution of services").[2]

j. NFPRHA also suggests that the Rule will degrade care because it removes the requirement that a Title X project provide "medically approved" family planning methods and allows entities to offer only a single method or a

[2] https://www.hhs.gov/opa/sites/default/files/FY2019-FOA-FP-services-amended.pdf.

limited number of family planning methods. NFPRHA Mem. at 32-34. But HHS addressed these concerns by explaining that, even if individual service sites might offer a limited number of family planning methods, each Title X project, as a whole, must "provide[] a broad range of family planning methods and services, including contraception and natural family planning." 84 Fed. Reg. at 7732; *see also* 42 C.F.R. § 59.5(a)(1) (effective May 3, 2019) (each "project" must "provide a broad range of family planning methods (including contraceptives, natural family planning, and other fertility awareness based methods)").

And with regard to the removal of the "medically" approved requirement in particular, NFPRHA's complaint is with Congress, not HHS: "When Congress specified what family planning methods and services Title X projects must provide, Congress directed that the methods and services be 'acceptable and effective'; it did not specify that they be 'medically approved.'" 84 Fed. Reg. at 7732 (quoting 42 U.S.C. § 300(a)). HHS addressed this issue directly, *see id*. at 7732, 7740-41, and explained that the "medically approved" language had not proved workable, *see id*. at 7732 (explaining practical difficulty of enforcing the "medically approved" requirement). This response was an adequate justification for returning to the text of the statute, which requires that any family planning services be "acceptable and effective," and which HHS rationally concluded would "sufficiently ensure[]" that Title X clients receive appropriate services. *Id*. NFPHRA also is in no position to object that *other* providers might offer family planning methods and services that NFPHRA would not itself offer. The Rule

leaves NFPHRA free to decide which methods and services to offer so long as its project grantees meet the statutory and regulatory requirements—primarily, that each project offer a broad range of methods including natural family planning (and, as the Rule specifies, contraception).

k. Finally, NFPRHA claims that the Rule is arbitrary and capricious because it imposes "new, convoluted criteria" regarding how HHS awards Title X grants. NPPRHA Mem. at 34-35. NFPRHA's complaint appears to be that the Rule requires Title X grant applicants to demonstrate their "affirmative compliance" with the other, substantive requirements of the Rule. *See* 42 C.F.R. § 59.7(b). As HHS explained, it implemented this additional requirement "to better direct Title X funds for family planning projects, to prevent misuse of funds, and to save taxpayer dollars by only sending qualified applications to the costly and time consuming competitive review committee." 84 Fed. Reg. at 7754.

NFPRHA cannot show how HHS's approach is anything but reasonable. Section 1006 of the Title X statute specifically provides that the Secretary may issue regulations setting forth criteria by which HHS will award Title X grants and contracts. 42 U.S.C. § 300a-4(a). HHS's criteria tracks the statute itself, listing and elaborating on the four non-exclusive criteria that Congress provided. 42 C.F.R. § 59.7(c)(1)-(4) (effective May 3, 2019). Both the statute and Rule specify that projects shall provide a broad range of family planning methods and services, and shall consider the relative needs of applicants, the capacity to make rapid and effective use of funds, the number of patients to be served, and local

need. The Rule also provides that proposals must specify how to meet these and other requirements of the regulations. Title X's grant application process—before and after this Rule—is a sophisticated one, with funding announcements and grant applications running many pages long, and being subject to a detailed review and scoring system. None of that complexity is new in this Rule, and the preamble to the Rule as well as longstanding agency practice makes it clear that HHS provides applicants with ample guidance during the process. The Title X statute fully authorizes the Secretary to promulgate regulations setting forth grant application criteria. NFPHRA may prefer the previous regulations, but nothing in the APA renders the criteria HHS chose arbitrary or capricious.

l. NFPRHA also takes issue with new review criteria regarding a grantees' "ability to procure a broad range of diverse subrecipients." NFPRHA Mem. at 36 (quoting 84 Fed. Reg. at 7754). But it is eminently reasonable for HHS to ask grantees to show how they can expand the impact of federal funds, consistent with Title X's mandate to provide "a broad range of acceptable and effective family planning methods and services," 42 U.S.C. § 300(a), and to take into account an applicant's capacity to make rapid and effective use of grants and contracts, *id.* § 300(b). NFPRHA's claim to the contrary is meritless.

II. PLAINTIFFS WILL SUFFER NO IRREPARABLE HARM

Showing irreparable harm absent an injunction is "necessary" to obtain such relief. *Ctr. for Food Safety v. Vilsack*, 636 F.3d 1166, 1171 n.6 (9th Cir. 2011); *Winter*, 555 U.S. at 19. A party "seeking preliminary relief [must]

demonstrate that irreparable injury is *likely* in the absence of an injunction." *Winter*, 555 U.S. at 22. Plaintiffs cannot carry that burden.

A. Washington

Washington's primary claim of irreparable harm is that the Rule will negatively impact the health of state residents. *See* Wash. Mem. at 43-44. Because these allegations "do not rise to the level of a concrete, particularized, actual or imminent injury against the state itself, that is independent from alleged harm to private parties," *Oregon v. Legal Servs. Corp.*, 552 F.3d 965, 972 (9th Cir. 2009), they cannot establish that Washington even has standing, much less that it has satisfied the demanding irreparable injury standard. Although the "doctrine of *parens patriae* allows a sovereign to bring suit on behalf of its citizens" in certain circumstances, *Washington v. Chimei Innolux Corp.*, 659 F.3d 842, 847 (9th Cir. 2011), it is well-established that a state "'does not have standing as *parens patriae* to bring an action against the Federal government,'" *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1178 (9th Cir. 2011) (quoting *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 610 n.16 (1982)).

Washington also alleges irreparable harm to its proprietary interests, namely that, in the event that the Rule leads to Title X providers leaving the program and patients losing access to care, the effects will harm Washington's "family planning network" and impact the state economically. Wash. Mem. at 40-43. Although Washington is a Title X grantee, it administers its statewide

program by overseeing a network of 16 subrecipients. *See id*. at 5. Washington's alleged injury is, in fact, an alleged injury to its subrecipients (who are not before the Court) rather than to the State itself. Even more, Washington's predictions depend on a number of uncertain events: (1) Washington's subrecipients would need to stop providing services, (2) quality of patient care would need to suffer as a result, and (3) Washington would need to bear the costs of any increased healthcare costs as a result. Washington has not shown that this attenuated chain of events is likely to occur.

B. NFPRHA

NFPRHA asserts that the Rule will (1) lead to a reduction in Title X providers and services, (2) interfere with the provider-patient relationship, and (3) harm patients and public health. None of these assertions establishes irreparable harm.

1. Impact on Title X Services

First, NFPRHA asserts that the Rule will lead some grantees and subrecipients that currently provide Title X services to forgo federal funds rather than comply with the Final Rule. NFPRHA Mem. at 41-42. But this argument rests on the erroneous assumption that the Rule is unlawful; an entity's choice not to comply with a legal funding condition plainly does not create an irreparable injury. And while NFPRHA also suggests that the providers who choose to remain in the Title X program will "expend scarce resources" to comply with the Rule, NFPRHA Mem. at 42, "ordinary compliance costs are typically insufficient

to constitute irreparable harm," *Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 115 (2d Cir. 2005) (collecting cases). NFPRHA offers no reason why this case should be treated any differently. To the contrary, the "providers" it describes—unlike regulated parties who must absorb significant costs to comply with federal regulations—can simply forgo receiving taxpayer funds if it would be more costly on balance to comply. And if the costs of compliance are less than Title X funding, the providers will come out ahead. Either way, there is no irreparable injury here. *See United States v. City of Los Angeles*, 595 F.2d 1386, 1391 (9th Cir. 1979) (federal agency actions "cannot be enjoined simply because those actions may require recipients of congressional largesse to expend large amounts of time and [monetary] resources").

2. Harm to Provider-Patient Relationship

Next, NFPRHA claims that the Rule will put providers into a "Hobson's Choice" between providing "substandard pregnancy counseling" and leaving the Title X program." But the Rule does no such thing. *See* 84 Fed. Reg. at 7724 (explaining that the counseling and referral requirements are consistent with medical ethics obligations). To the extent providers believe that it is necessary to make abortion referrals, they are free to do so. They simply cannot, consistent with the requirements of Section 1008, do so within a project funded by Title X funds. *See Rust*, 500 U.S. at 203 ("[A] doctor's ability to provide, and a woman's right to receive, information concerning abortion and abortion-related services outside the context of the Title X project remains unfettered."). And although

Plaintiffs suggest that the Rule will "harm their reputation[] and goodwill," NFPRHA Mem. at 41, they do not establish, with concrete examples of particular patients of any named provider plaintiff, that such harm is imminently likely to occur during the pendency of this litigation if an injunction is not entered.

3. Harm to Patients and Public Health

Finally, NFPRHA argues that the Rule will "harm—irreparably—Title X patients across the country." NFPRHA Mem. at 43. In making these allegations, NFPRHA impermissibly "attempts to redirect the focus of the irreparable harm inquiry to third parties," but "'[a] plaintiff seeking a preliminary injunction must establish that *he is* likely to suffer irreparable harm in the absence of preliminary relief.'" *Exeltis USA Inc. v. First Databank, Inc.*, No. 17-cv-04810-HSG, 2017 WL 6539909, at *9 (N.D. Cal. Dec. 21, 2017) (quoting *Winter*, 555 U.S. at 20) (ellipsis omitted). NFPRHA has not done so here.

In any event, NFPRHA has not demonstrated that the public health harms it describes are "of such *imminence* that there is a clear and present need for equitable relief to prevent irreparable harm." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006). But much like Washington's alleged harms, NFPRHA's predictions will come to pass only if (1) a significant number of subrecipient providers choose to leave the Title X program rather than comply with the Final Rule; and (2) without such funding, such providers are no longer able to provide health services, NFPRHA Mem. at 44; and (3) as a result, "unintended pregnancy rates [will] rise and other public health consequences [are]

felt," *id*. at 44. And this chain of hypotheticals in turn rests on the unstated assumption that new providers will not fill any gaps if current providers (such as Planned Parenthood) leave the program. As discussed above, HHS concluded the opposite in the Rule, and that determination was not arbitrary and capricious. *See also* 84 Fed. Reg. at 7756 (concluding that Rule will "expand[] the type and nature of the Title X providers . . . so as to fill gaps and expand family planning services").

III. THE BALANCE OF EQUITIES AND THE PUBLIC INTEREST WEIGH IN FAVOR OF DENYING PLAINTIFFS' MOTIONS

On the other side of the ledger, the government will "suffer[] a form of irreparable injury" if it "is enjoined by a court from effectuating statutes enacted by representatives of its people." *Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers) (citation omitted). That is particularly true here, as the government has a compelling interest in following longstanding federal law prohibiting the use of Title X funds for programs where abortion is a method of family planning. *See* 42 U.S.C. § 300a-6. Granting Plaintiffs their desired injunction would require HHS to disburse taxpayer dollars in violation of Title X and would thwart lawful regulations intended to avoid any risk that federal funds will be used—or perceived to be used—to subsidize abortion, an unquestionably irreparable injury to both the government and the public more generally.

The need to avoid that harm significantly outweighs any of Plaintiffs' asserted injuries. At bottom, Plaintiffs simply desire to receive government

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subsidies under the terms and conditions they prefer. But "the government may 'make a value judgment favoring childbirth over abortion, and . . . implement that judgment by the allocation of public funds,'" by "subsidiz[ing] family planning services which will lead to conception and child birth, and declining to 'promote or encourage abortion.'" *Rust*, 500 U.S. at 192-93 (citation omitted). Accordingly, the balance of equities and public interest make preliminary injunctive relief inappropriate.

A preliminary injunction would particularly disserve the public interest given the nature of Plaintiffs' attacks against the Rule. *Rust* blessed highly similar regulations and, as discussed at length previously, Plaintiffs' argument that Congress silently abrogated *Rust* lacks merit, as discussed above. Necessarily then, most of Plaintiffs' arguments amount to various assertions that HHS failed to adequately consider particular issues and topics in a rulemaking consisting of over 500,000 comments. Those arguments are wrong, particularly since an agency "need not address every comment" but must only "respond in a reasoned manner to those that raise significant problems." *Reytblatt v. Nuclear Regulatory Comm'n*, 105 F.3d 715, 722 (D.C. Cir. 1997). Indeed, failing to respond to comments is not itself a sufficient basis for invalidating federal agency action. Rather, "[t]he failure to respond to comments is significant only insofar as it demonstrates that the agency's decision was not based on a consideration of the relevant factors." *Thompson v. Clark*, 741 F.2d 401, 409 (D.C. Cir. 1984). But even if the Court were later to accept some of these arguments, the

likely remedy would be a remand without vacatur. *See Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 532 (9th Cir. 2015) (vacatur less appropriate when agency "could adopt the same rule on remand" by "offer[ing] better reasoning" or "by complying with procedural rules"); *La. Fed. Land Bank Ass'n, FLCA v. Farm Credit Admin.*, 336 F.3d 1075, 1085 (D.C. Cir. 2003) (remanding rather than vacating based on the conclusion that it was "not unlikely" that the agency "'[would] be able to justify a future decision to retain the [r]ule'" (citation omitted)). The Court should not issue a sweeping preliminarily injunction against the Rule's operation when Plaintiffs would, at most, be entitled to far more limited relief at final judgment.

IV. ANY INJUNCTIVE RELIEF SHOULD BE LIMITED

A. Any Injunctive Relief Should Be Limited To The Plaintiffs

At a minimum, any injunction should be no broader than necessary to provide Plaintiffs relief, and should therefore be limited to redressing the injuries of the parties before this Court. As the Supreme Court recently confirmed, any "remedy" ordered by a federal court must "be limited to the inadequacy that produced the injury in fact that the plaintiff has established"; a court's "constitutionally prescribed role is to vindicate the individual rights of the people appearing before it"; and "[a] plaintiff's remedy must be tailored to redress the plaintiff's particular injury." *Gill v. Whitford*, 138 S. Ct. 1916, 1921, 1933-34 (2018); *see Doe v. Shanahan*, 917 F.3d 694, 740 (D.C. Cir. 2019) (Williams, J., concurring in result) (recognizing the implications of *Gill* for nationwide

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injunctions). Equitable principles likewise require that an injunction "be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (citation omitted); *see also Trump v. Hawaii*, 138 S. Ct. 2392, 2429 (2018) (Thomas, J., concurring) (noting that nationwide injunctions "are legally and historically dubious"). These principles apply with even greater force to a preliminary injunction, an equitable tool designed merely to "preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981); *accord Zepeda v. INS*, 753 F.2d 719, 728 n.1 (9th Cir. 1983).

Here, Plaintiffs fail to show that a nationwide injunction is necessary to redress their alleged injuries. Indeed, leading up to the Supreme Court's decision in *Rust*, every district court to enjoin the 1988 regulations limited that relief to the parties before it. *See W. Va. Ass'n of Cmty. Health Centers, Inc. v. Sullivan*, 737 F. Supp. 929, 956-57 (S.D.W. Va. 1990); *Planned Parenthood Fed'n of Am. v. Bowen*, 687 F. Supp. 540, 544 (D. Colo. 1988); *Massachusetts v. Bowen*, 679 F. Supp. 137, 148 (D. Mass. 1988). Plaintiffs provide no tenable reason why the Rule should be treated differently from how courts proceeded before.

To start, Plaintiffs' decision to bring APA claims does not necessitate a nationwide remedy. *See, e.g.*, *California v. Azar*, 911 F.3d 558, 582-84 (9th Cir. 2018) (vacating nationwide scope of injunction in facial challenge under the APA); *Los Angeles Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664-65 (9th

Cir. 2011) (same). A court "do[es] not lightly assume that Congress has intended to depart from established principles" regarding equitable discretion, *Weinberger v. Romero-Barcelo,* 456 U.S. 305, 313 (1982), and the APA's general instruction that unlawful agency action "shall" be "set aside," 5 U.S.C. § 706(2), is insufficient to mandate such a departure. Indeed, the Supreme Court held that not even a provision directing that an injunction "shall be granted" was sufficient to displace traditional principles of equitable discretion, *Hecht Co. v. Bowles*, 321 U.S. 321, 328-30 (1944), and Congress is presumed to have been aware of that holding when it enacted the APA two years later. In fact, the APA confirms that, absent a special review statute, "[t]he form of proceeding for judicial review" is simply the traditional "form[s] of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction," 5 U.S.C. § 703, and that the statutory right of review does not affect "the power or duty of the court to . . . deny relief on any . . . appropriate legal or equitable ground," *id.* § 702(1). The Supreme Court therefore has confirmed that, even in an APA case, "equitable defenses may be interposed." *Abbott Labs. v. Gardner*, 387 U.S. 136, 155 (1967). Accordingly, the Court should construe the "set aside" language in Section 706(2) as applying only to the named Plaintiffs, especially as no federal court had issued a nationwide injunction before Congress's enactment of the APA in 1946, nor would do so for more than fifteen years thereafter, *see Hawaii*, 138 S. Ct. at 2426 (Thomas, J., concurring).

Nor does the Rule's "nationwide" impact require a nationwide injunction. NFPRHA Mem. 44. The Supreme Court recently explained that under Article III, the proper remedy in a constitutional vote-dilution challenge brought by an individual voter entailed "revising only such districts as are necessary to reshape the voter's district" rather than "restructuring all of the State's legislative districts[,]" *notwithstanding* that the alleged gerrymandering was "statewide in nature" rather than limited to each plaintiff's particular district. *Gill*, 138 S. Ct. at 1920, 1930-31. Likewise, the Ninth Circuit recently vacated the nationwide scope of an injunction against particular interim final rules, even though "the agencies' own regulatory impact analysis" estimated that the rules would affect between "31,700 and 120,000 women *nationwide*." *California*, 911 F.3d at 572 (emphasis added). These holdings confirm that it is the scope of the plaintiff's injury and not the defendant's policy that governs the permissible breadth of an injunction under Article III.

Likewise, that NFPRHA "represents Title X funding recipients in all states and two territories" makes no difference. NFPRHA Mem. at 44. That Plaintiffs are *geographically* dispersed is no basis for enjoining the Rule's application to *non-parties*. For example, one of the district courts that enjoined the 1988 regulations acknowledged that the plaintiffs before it included "national organizations" that "represent[ed] nearly 75% of Title X recipients and 285 subgrantees across the country," but nevertheless limited its injunction to "the plaintiffs in this action." *Massachusetts*, 679 F. Supp. at 148. Likewise, the Ninth

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Circuit recently vacated the nationwide scope of an injunction, even though the plaintiffs were five states located in many federal judicial circuits. *California*, 911 F.3d at 568 (plaintiffs were "California, Delaware, Maryland, New York, and Virginia").

Finally, the structure of the Title X program does not support entry of a nationwide injunction. *See* Wash. Mem. at 45; NFPRHA Mem. at 43. Contrary to Plaintiffs' suggestion, a nationwide injunction is not necessary to "ensure an even playing field." Wash. Mem. at 45 (citing *City of L.A. v. Sessions*, 293 F. Supp. 3d 1087, 1100-01 (C.D. Cal. 2018)); NFPRHA Mem. at 43 (same). Title X funds are allocated on a state-by-state basis, so any effect of the Rule on funding in other states would have no impact on Washington. *See* HHS, *Announcement of Anticipated Availability of Funds for Family Planning Services Grants* 13-14 (Feb. 23, 2018).[3]

Nationwide relief would be particularly harmful here given that three other district courts in California, Maine, and Oregon are currently considering similar challenges. If the government prevails in all three other jurisdictions, a nationwide injunction would render those victories meaningless as a practical matter. It would also preclude appellate courts from testing Plaintiffs' factual assertions against the Rule's operation in other jurisdictions. For example, in *Rust* itself, the

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[3] https://www.hhs.gov/opa/sites/default/files/FY18-Title-X-Services-FOA-Final-Signed.pdf.

claim that the separation requirements in the 1988 regulations would "be applied in an arbitrary manner" was refuted by the fact that in the states where those regulations "ha[d] been implemented," there had been "no issues of compliance." Br. for Resp't at 45 n.51, *Rust* (No. 89-1391), 1990 WL 10012655 (U.S. Sept. 7, 1990); *see also California*, 911 F.3d at 583 ("The Supreme Court has repeatedly emphasized that nationwide injunctions have detrimental consequences to the development of law and deprive appellate courts of a wider range of perspectives."). In addition, other states—especially those that have taken measures to ensure that their own funds are not used to subsidize family planning through abortion—have welcomed the Rule. *See* ECF No. 43-1 (amicus curiae brief of fourteen states in support of the Rule); *see also, e.g.*, *Planned Parenthood of Greater Ohio v. Hodges*, 917 F.3d 908, 910 (6th Cir. 2019) (en banc) (upholding Ohio law prohibiting state health department from funding organizations that "[p]erform nontherapeutic abortions"). There is no reason why Plaintiffs' views on abortion funding should govern the rest of the country. *See California*, 911 F.3d at 583 ("The detrimental consequences of a nationwide injunction are not limited to their effects on judicial decisionmaking. There are also the equities of non-parties who are deprived the right to litigate in other forums.").

B. Any Injunctive Relief Should Be Limited To Particular Provisions

Similarly, should the Court decide to enjoin any portion of the Rule, the Court should allow the remainder to go into effect. In determining whether severance is appropriate, courts look to both the agency's intent and whether the regulation can function sensibly without the excised provision(s). *MD/DC/DE Broads. Ass'n v. FCC*, 236 F.3d 13, 22 (D.C. Cir. 2001).

Here, HHS's intent is clear: the Rule provides that "[t]o the extent a court may enjoin any part of the rule, the Department intends that other provisions or parts of provisions should remain in effect." 84 Fed. Reg. at 7725. Nor is there any functional reason why the entire Rule must fall if the Court agrees with Plaintiffs' attacks on particular provisions. The program integrity requirements can function without the referral requirements (and vice versa). And there is certainly no logical basis for enjoining the entire Rule if the Court agrees with some of Plaintiffs' various challenges to more ancillary provisions (*e.g.*, the "medically approved" requirement). None of these provisions should be enjoined, but there is no compelling justification for extending any injunctive relief beyond any particular offending provision(s).

Finally, Washington argues in passing that if the Court does not enjoin the Rule, it should stay its effective date pursuant to 5 U.S.C. § 705. *See* Wash. Mem. at 45. As Washington correctly notes, courts considering requests for such relief apply the same test as when considering a request for a preliminary injunction.

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Plaintiffs have not satisfied that standard. And even if they had, as discussed in this section, nationwide relief would not be appropriate.

CONCLUSION

Accordingly, Plaintiffs' motions for preliminary injunction should be denied.

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DECLARATION OF SERVICE

I hereby declare that on this day I caused the foregoing document to be electronically filed with the Clerk of the Court using the Court's CM/ECF System which will send notification of such filing to the attorneys for all parties.

DATED this 12th day of April, 2019, at Washington, D.C.

/s/ Bradley P. Humphreys
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